

Does Ukraine need satisfaction?

Policy brief



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The draft principles of International Law Commission (ILC) refer to “satisfaction”, which consists in “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality” as the third form of damage compensation – reparations.

Satisfaction is intended as a form of compensation for damage caused by a violation that cannot be quantified and, as such, is “unsuitable” for compensation in other forms. With regard to satisfaction, international instruments provide for some flexibility depending on the nature and extent of the damage.

According to international practice, in the case of damage caused directly to the country or international organization, the latter has the right to claim damages from the country or international organization that caused the damage. Compensation for moral damage is endowed with peculiarities. It should be noted that in the study of satisfaction, the terms “moral”, “psychological” and “spiritual” harm are used synonymously. The endowment of this category of damage with certain features is due to the fact that the destruction of, for example, forests, pollution of water bodies with consequences in the form of extinction of fish and related plants, entail not only actual material damage, environmental degradation but also moral damage to citizens who enjoyed and/or cared about such natural resources. In view of the scale of the hostilities, we can speak, without exaggeration, about spiritual damage to all the people of the state in the territory of which the damage was caused. In the case of such “special” damage, its compensation should be performed by “special” actions. These actions take various forms, such as official apologies, symbolic actions, such as raising a flag or sending a delegation to mediate, prosecuting and imposing internal penalties, including administrative, disciplinary and judicial measures against the state or individuals.

In addition, it is often believed that announcing by a judge or international arbitrator the wrongfulness of the damage caused is also an act that can satisfy the victim and is a form of satisfaction. This aspect is often overlooked by international researchers, but recognition by a judge or international arbitrator of wrongfulness of the damage caused should be considered a form of satisfaction only if the offending state recognizes the powers of such a judicial body and executes its decisions in good faith. Otherwise, such a declaration will not correspond to the essence and nature of satisfaction as such.

A country that is recognized as internationally responsible for illegal actions is obliged to compensate for the damage caused and to make satisfaction in favor of the state that suffered losses. It is important that measures taken as satisfaction do not necessarily have to be directly related to the damage caused. For example, a state that discharges hazardous substances into a body of water in another state does not necessarily have to sanitize it, but may publicly apologize, plead guilty, and ensure that such actions do not recur in the affected state. Also, measures taken for the purpose of satisfaction cannot be offensive to the responsible state.

It should be noted that the injured party has the right to demand from the offending state to stop the illegal action and to provide guarantees to the affected state that the action will not be repeated. In its judgment of 27 June 2001 in the La Grande case, the UN International Court of Justice (UN ICJ) forced the convicted State to resort to this form of satisfaction of the injured State and to assure the latter that the wrongdoing would not be repeated in the future. In general, it seems that the issue of guarantees and confidence-building is more the result of the gradual development of international law than the codification of statutes. However, when dealing with a completely unreliable counterparty such as the Russian Federation, it is important to have more than just internationally binding guarantees of non-repetition of illegal actions in the form of acts, treaties, etc. but also guarantees of implementation of such acts by other states that would include real mechanisms of enforcement in case of violations of the guarantees undertaken by Russia.

Article 31 of the draft articles "On the Responsibility of States for Internationally Wrongful Acts" (hereinafter "IWA Articles") codifies the obligation to provide "full compensation" for material or moral damage caused by internationally wrongful acts of the state. Articles 34-37 of the IWA provide for a hierarchy in the system of appropriate forms of compensation: restitution is defined as a priority form of reparations if it is "impossible" or "inappropriate", compensation is applied to the extent of the financial assessment of the damage. Satisfaction is used as a residual form to compensate for the damage.

In the context of environmental damage, fairness of this hierarchy is often questioned. As the damage to the environment is often irreversible, compensation is likely to be a more realistic and effective way than recovering lost resources or even their equivalents. Restoring the environment is resource-intensive and requires expertise and equipment that requires a focus on compensation. However, damage to the environment is sometimes difficult to quantify, such as processes and phenomena that are sometimes referred to as "invaluable values", such as biodiversity. Determining its "value" is quite difficult, if not impossible. Where people have been affected by environmental damage, the concept of "leveling" the damage can be not only impossible but also offensive. In addition, compensation alone may not affect the individual suffering of individuals. Academic papers often point out that the legal literature focuses on the concept of satisfaction to indicate the difference between returning to the pre-damage state and the approximate form of compensation required for compensation, especially when the damage is partly psychological. Some experience of redress demonstrates the importance of acknowledging the suffering that the responsible party has caused to individuals as a result of their actions. Full redress implies wide recognition of the purpose of the damage, and in a post-conflict context, wide recognition of guilt as a violation of international law is welcome.

Where resources are scarce and the damage varies in nature, recovery pathways should be maximized to increase the likelihood that the damage will be fully compensated by appropriate means.

Cases of application of satisfaction in practice should be considered. For example, the Ethiopian and Eritrean Claims Commission found that Ethiopia had committed violations by air strikes on the Harsin Reservoir. However, as no significant damage was caused to the reservoir, the Commission decided that its decision on liability was sufficient reparation. Thus, it referred to satisfaction as an appropriate form of compensation. Ethiopia's \$ 1 billion

lawsuit for damage to the environment and natural resources has been rejected. The Commission decided that, although the damage in this case was theoretically compensable as a result of the *jus ad bellum* violation, the claim was ungrounded.

Another example is the case of Costa Rica and Nicaragua. Throughout the dispute between Costa Rica and Nicaragua, the UN International Court of Justice has not discussed in detail what type of compensation is most appropriate to compensate for environmental damage. When the Court found that Costa Rica had breached its procedural obligations by not preparing a report on environmental impact assessment, it concluded that the declaration in the decision to violate Costa Rica's obligations constituted "an appropriate measure of satisfaction for Nicaragua". The court noted that "in the absence of pecuniary damage, the official recognition of wrongdoing compensates for the breach of obligation." However, the Court has not been able to consider the impact of this decision on the conduct of other States. Having established that satisfaction is a sufficient means of legal protection against failure to conduct an environmental impact assessment, the court did little to encourage states to comply with their procedural obligations. When States recognize that the only remedy against breach of procedural obligations is a declaration of illegality, and that an obligation to compensate exists only when material damage occurs, they can avoid the costs of conducting an environmental impact assessment and accept the risk of environmental damage.

There is also a theory that it is convenient to use Satisfaction indicators when compensation and recovery are not possible. The measures of "satisfaction" can include public apologies and remembrances, as well as reconciliation initiatives.

CONCLUSIONS

Analyzing the above, it should be noted that, despite the external attractiveness and the ability to compensate for moral and psychological damage, satisfaction carries with it a number of risks for Ukraine. Most of them are due to the fact that we have to deal with a completely unreliable counterparty who completely ignores the world order and its norms. In this regard, the Ukrainian authorities should take all possible measures to obtain, in the first instance, reparations in the form of restitution and compensation from the responsible state, in order to exclude the possibility of Russia claiming, for example, public apologies for environmental damage and this should be considered as adequate compensation for the damage through satisfaction. This requires the development of methods and mechanisms for calculating the damage caused to the environment, official approval and implementation of the latter. It is important to have constant emphasis during the consideration of cases on compensation for environmental damage that it can be calculated and will be calculated. In addition, in its appeals and statements, the Ukrainian side should point out that compensation for the damage caused to our environment should mainly consist of restitution, where possible, as well as compensation. Satisfaction can take place only after the implementation of restitution and compensation measures. It is important to take all possible measures to prevent Russia from avoiding responsibility by profaning satisfaction both in international judicial institutions and in the international arena as a whole.

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